No. 88-1628

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN and PAMELA R. MONZERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF OF THE *ARDEN WAY* PLAINTIFFS AS AMICI CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Plaintiffs in *Arden Way Associates, et al.* v. *Ivan F. Boesky, et al.* ("*Arden Way*")* , which action has been consolidated as part of *In re Ivan F. Boesky Securities Litigation,* MDL Dkt. No. 732, M21-45-MP, pending before the Honorable Milton Pollack, Senior United States District Judge for the

* The *Arden Way* plaintiffs are Arden Way Associates; Bankers Life and Casualty Company; Broad and K, a California Limited Partnership; CityFed Financial Corp.; Commercial Union Assurance Co. plc; Commercial Union Pensions Management, Ltd.; Joseph S. Dresner; Milton H. Dresner, as Trustee; First City Securities, Inc.; Frobar Investment Co.; Gemini Overseas Corporation; Heron Financial Corporation; The Home Insurance Company; Imperial Group Pension Trust Limited and Imperial Group Pension Investments Limited; Ellen Kislak, as Executrix for the Estate of Myron Kislak; Lewis E. Lehrman; Liberty Service Corporation; The Lincoln National Life Insurance Company; Eldon C. Mayer Jr.; Mercia Zurich A.G.; Lowell A. Mintz; M.J. Corporation; National Can Corporation; Northern Trust Company, as Trustee; Overbrook Nominees, Ltd.; Pantherhouse Investments N.V.; Parliament C.V.; Martin Peretz; Peretz Family Investments; Pentagram Partners;

(footnote continued on next page)

Southern District of New York, hereby respectfully move, pursuant to Rules 36.3 and 42 of the Rules of this Court, for leave to file the accompanying brief as amici curiae in opposition to the petition for certiorari. Respondent has consented to the *Arden Way* plaintiffs' participation, but Petitioners have withheld consent.

The *Arden Way* plaintiffs have a strong interest in opposing the petition for certiorari. Judge Pollack has actively presided over *Arden Way* and related cases for more than two years, commencing well before the events contrived to claim his disqualification. Judge Pollack is intimately acquainted with the issues in these actions, having entered numerous orders and opinions. The cases, including *Arden Way*, have suffered by the delay resulting from the proceedings to disqualify Judge Pollack. The substitution of a new judge would only result in more delay. An amici brief on behalf of the *Arden Way* plaintiffs is desirable to highlight these concerns and give a voice to the civil litigants who have been adversely affected by the delay occasioned by the Petitioners' and others' disqualification efforts.

(footnote continued from preceding page)

Jeffry Picower; Mark S. Ptashne; Rapid-American Corporation; Rhinelander N.V.; J. Henry Schroder & Co. A.G. Vaduz; Schroders Incorporated; State Street Bank and Trust Company, as Trustee; Strand Nominees, Ltd.; United Shelters, Inc.; William T. Ward; Water Authorities Superannuation Fund; and Zanar Investments, Inc.

For these reasons, the *Arden Way* plaintiffs respectfully request leave to participate as amici curiae in opposition to the petition for a writ of certiorari.

Respectfully submitted,

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May 5, 1989

QUESTIONS PRESENTED

I. Should this Court engage in fact finding when the facts, as determined by the two courts below, are not clearly erroneous?

II. Should the recognized standard for invoking the exceptional remedy of mandamus only upon a showing of a clear and indisputable right to such relief be eroded on review of a claimed wrongful refusal to recuse, thus opening the door to piecemeal appeals and providing litigants with another weapon for delay and harassment?

III. Does application of the objective standard when determining whether a Judge's "impartiality might reasonably be questioned" under 28 U.S.C. § 455(a) require the court to assume that a reasonable person has knowledge of all facts and circumstances, or must the court ignore certain facts as being beyond the ken of the ordinary person?

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STATEMENT OF INTEREST

As explained in the foregoing motion, amici have a direct and substantial interest in the outcome of this case.

The *Arden Way* action, commenced in March 1987 and assigned to Judge Pollack, alleges, *inter alia*, injury as the result of federal securities law violations by Ivan Boesky and others, including Drexel Burnham Lambert Incorporated

("Drexel").[1] The Securities and Exchange Commission ("SEC") commenced the instant action against Michael R. Milken, Lowell J. Milken and Pamela R. Monzert (collectively, "Petitioners"), Drexel and others on September 7, 1988 (the "*SEC* action"). The *SEC* action alleges that Drexel, Petitioners, and others violated the federal securities laws, including a violation committed upon the *Arden Way* plaintiffs. Upon its filing, the *SEC* action was designated as a related case to *Arden Way* since they involved common issues of law and fact and was assigned to Judge Pollack. Subsequently, Judge Pollack directed that the *SEC* action and *Arden Way* be coordinated for pre-trial proceedings.

Because of the efforts to disqualify Judge Pollack in the *SEC* action, *Arden Way* has been subject to interminable delay. The substitution of a new judge in these proceedings is unwarranted and would result in further delay of *Arden Way* and related civil cases. In order to protect the *Arden Way* plaintiffs' and other civil litigants' interests in a timely disposition of their claims, amici seek to participate in these proceedings.

STATEMENT OF THE CASE

In June 1988, stockholders of Palais Royal Inc. ("Palais Royal"), a closely held corporation, entered into a contract with Bain Venture Capital ("Bain") for the sale of their stock to Bain. The Palais Royal stockholders included Mrs. Moselle Pollack (Judge Pollack's wife) and members of her family. Bain planned to carry out the transaction through Specialty Holdings Inc. ("SHI"), a wholly owned subsidiary. The transaction was an all cash deal and was contingent upon Bain's (SHI's) obtaining the necessary financing for the purchase. Bain (SHI) agreed to use its best efforts to obtain financing on "terms reasonably satisfactory to [Bain]." (A6).[2] The financing

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[1] Petitioners, employees of Drexel, are not defendants in *Arden Way*. On March 20, 1989, prior to the filing of the instant petition, the *Arden Way* plaintiffs served and filed a motion to amend their complaint to, *inter alia*, assert claims against Petitioners Michael R. Milken and Lowell J. Milken.

[2] Citations styled "A____" are to the Appendix to petition for a writ of certiorari.

was Bain's (SHI's) exclusive responsibility, and, at Bain's (SHI's) request, none of the selling stockholders had any contact with potential lenders. (A6).

Subsequently, Bain (SHI) entered discussions with Drexel to obtain financing for Bain's (SHI's) purchase of the Palais Royal stock. (A35).[3] There was never any evidence that Petitioners, employees of Drexel, had any personal interest or participation in the proposed financing by Drexel for Bain (SHI). The evidence below established that, since the transaction was not a difficult one to finance and several investment banking firms could provide financing on terms competitive with those offered by Drexel, the transaction could be successfully financed regardless of Drexel's participation. (A6-7. *See also* A47-48).

Drexel engaged in a course of conduct with respect to providing Bain (SHI) with funding with full knowledge that the *Arden Way* action and related cases were assigned to Judge Pollack. (A35. *See also* A7-8). In addition, at the time Drexel raised the issue of Judge Pollack's disqualification, Drexel was not committed to provide the financing to Bain (SHI). (A7).[4] Yet, Drexel proceeded to commit to the transaction with Bain (SHI) with full knowledge of Judge Pollack's participation in these cases.

On Saturday, September 10, 1988, Drexel's counsel telephoned Judge Pollack *ex parte* to notify him of the alleged potential conflict resulting from Drexel's discussions with Bain (SHI) regarding the possibility of Drexel's providing financing to Bain (SHI) to buy the Palais Royal stock. At a hearing held September 13, the matter was discussed by the court with counsel for the SEC and Drexel. On September 20, Drexel, joined by Petitioners, employees of Drexel, filed a motion to disqualify Judge Pollack in the *SEC* action. Then and since

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[3] Prior to the filing of the within petition, the transaction between Bain (SHI) and Palais Royal stockholders closed. Even after the transaction closed, Drexel publicly stated that it only acted as financial adviser to Bain (SHI). *See* Wall St. J., Jan. 6, 1989, at C12, col. 1.

[4] Drexel did not commit to its transaction with Bain until November 1988.

then, in pursuing Judge Pollack's recusal, Petitioners have relied only on the grounds asserted by Drexel and have alleged no independent reason for recusal related to their status as Drexel employees.

Subsequently the recusal motion was broadened to encompass the other Drexel related actions pending before Judge Pollack, including *Arden Way*. Arguments on the motions were scheduled for October 11. (A9). On September 30, Drexel and Petitioners filed a petition for a writ of mandamus with the Second Circuit Court of Appeals seeking Judge Pollack's recusal in the *SEC* action. The Second Circuit denied the application as premature, and the hearing before Judge Pollack proceeded on October 11. (A9).

On October 17, Judge Pollack denied the recusal motion. Judge Pollack reviewed the entire record and found that Drexel had no financial or business connection, or other relationship, with Mrs. Pollack. (A46). As required, Judge Pollack posited " 'whether a reasonable member of the public at large, aware of all the facts, might fairly question the court's impartiality' " (A49), and concluded that the sale of Palais Royal stock to Bain (SHI) provided no reasonable basis for doubting the court's impartiality. In summary, Judge Pollack stated:

> This court can confidently respond, unhesitatingly, that under all the actual facts and circumstances herein, it has no doubt that a reasonable person, a member of the public, would fail to perceive even the slightest doubt of the appearance of the Judge's impartiality.

(A49).

Drexel, joined by its employee-Petitioners, again petitioned the Second Circuit for a writ of mandamus. On November 15, 1988, the Second Circuit denied the petition. The Second Circuit found that, under 28 U.S.C. § 455(a), "the test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts.*" (A13) (emphasis in original) (citations omitted). The Second Circuit

disagreed with the dissent's implication that a reasonable person would be incapable of understanding the nature of the relationships among the parties. The determination under § 455(a), said the Second Circuit, is made "not by considering what a straw poll of the only partly informed man-in-the-street would show," but by deciding "whether a reasonable person knowing and understanding all the relevant facts" would perceive impropriety on behalf of the judicial officer. (A14).

The Second Circuit stated the relevant facts:

> Petitioners charge that because Mrs. Pollack is obtaining $30 million for the sale of her stock in Palais Royal there has been created an appearance of impropriety that requires Judge Pollack's recusal. The charge is based on the two premises: that Drexel's money will be paid to Mrs. Pollack and that Drexel is indispensable to the transaction. Neither statement is true. Mrs. Pollack has had no business or other dealings with Drexel; she will receive no money from Drexel; and Drexel is not essential to the completion or success of the transaction. Moreover, there is no nexus, direct, indirect or otherwise, between the civil suits pending before Judge Pollack and Mrs. Pollack's interest in Palais Royal.
>
> Instead, the relevant facts are that Drexel has a potential commitment to Bain or SHI, *not* to Palais Royal or to Mrs. Pollack. If Drexel performs its role, the funds will belong to Bain and *not* to Palais Royal; if Drexel fails to perform for Bain or SHI, some other financial institution is likely to because it is a profitable opportunity.

(A17) (emphasis in original).

The Second Circuit concluded that Judge Pollack's connection to Drexel would be perceived by the reasonable person as too remote to raise the specter of partiality. Accordingly, after noting that the exceptional remedy of mandamus could only be invoked upon a clear and indisputable right to such relief, the Court of Appeals resolved the facts, found that no reasonable person would doubt Judge Pollack's impartiality and,

consequently, denied the petition for writ of mandamus. (A17, A20).[5]

On February 21, 1989, the Second Circuit denied a petition for rehearing and suggestion for rehearing in banc, filed by Drexel and Petitioners. Judge Miner, joined by Judges Meskill, Cardamone and Pierce, concurred in the denial of rehearing in banc, and concluded that the panel majority properly reviewed the question of whether Judge Pollack's impartiality might reasonably be questioned in accordance with the "objective observer" standard mandated by this Court. (A38). After reviewing the facts surrounding the sale of Palais Royal stock by Mrs. Pollack (as those facts were found by the District Court and the Second Circuit), Judge Miner found it "quite unexceptional to draw from these findings an objective conclusion that no appearance of partiality would be provided by Judge Pollack's continued service in the actions against Drexel." (A38). Judge Miner found that the Second Circuit's "conclusions merely were 'reinforced' by the stringent requirements for success on a mandamus petition." (A40).

On April 5, 1989, Petitioners filed their petition for a writ of certiorari. Subsequently, on April 13, 1989, Drexel entered into a Consent and Undertakings ("Consent") in the *SEC* action. (B1-3).[6] Drexel, according to the Consent, has agreed to discontinue any efforts to remove Judge Pollack from presiding over the *SEC* action and related litigations, including *Arden Way*. (B2-3). Petitioners, employees of Drexel who never had any personal interest or participation in the Drexel financing asserted as a basis for recusal, now improperly pursue recusal of a judge which Drexel no longer seeks. When the final judgment is entered against Drexel in the *SEC* action, Drexel will no longer be a party in that case.

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[5] The Second Circuit noted that a reasonable person knowing all the facts and circumstances would take into consideration the sworn assertions claiming an attempt by Drexel to manipulate the judicial process through judge-shopping. (A18). The court stated, however, that "[t]hese assertions are not established facts upon which decision may rest" and, thus, the "decision does not turn on these assertions." (A18, A20).

[6] Citations styled "B____" are to the Appendix to this brief.

REASONS FOR DENYING THE WRIT

The Petition contains a non-conflict with respect to a non-consequential issue of law. Petitioners contend that the Second Circuit applied "erroneous" and "unprecedented" legal theories in this case. (Pet. 8).[7] Specifically, they argue that the mandamus standard applied by the Second Circuit was "incorrect and unworkable", and that the Second Circuit, in interpreting and applying § 455(a), adopted a "subjective" disqualification standard that shows "contempt for perceptions of the average members of the public." (Pet. 8, 9, 15).

Petitioners' arguments lack merit. *First*, Petitioners invite this Court to engage in unwarranted fact finding. *Second*, Petitioners ask this Court to create an exception to the well-settled standard for the issuance of a writ of mandamus. *Third*, Petitioners urge a bizarre formulation of the reasonable person test and mischaracterize the standard applied by the Second Circuit. In sum, the Second Circuit applied legal standards that comport with all relevant statutory and decisional law. The decision of the Second Circuit is not in conflict with any decision of this Court or of any federal appellate court.

I. SINCE THE FACTS AS FOUND BY THE TWO COURTS BELOW ARE NOT CLEARLY ERRONEOUS, THIS COURT SHOULD DECLINE TO ENGAGE IN FACT FINDING.

A. This Court Has Established that It Will Engage in a Factual Review Only in Exceptional Cases.

Contrary to the settled rule of this Court, Petitioners invite this Court to review the facts as found by the two courts below and engage in its own fact finding. In order to do so, this Court:

> . . . would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

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[7] Citations styled "Pet.____" are to the petition for a writ of certiorari.

Berenyi v. *Information Director*, 385 U.S. 630, 635 (1967) (*citing Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949)). *See also NCAA* v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85, 95 n.15 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

Petitioners present no reason why this Court should deviate from its established rule in this case.

B. The Facts as Found by the Two Courts Below Should Not Be Disturbed.

The facts that control here are those found by the District Judge and affirmed by the Second Circuit. Arguments of the Petitioners premised on minority views (unsupported by the factual record or the findings below) have no force on this application.

One example of fundamental error of fact by the minority below, on which Petitioners depend, was reliance on the "assumption" that Drexel was inadvertently brought into the relationship with the spouse of the District Judge. That was clear error on the part of the minority. Further, the minority judge's statement of what he considered fundamental was expressed:

> To me, the inescapable relevant fact is that Drexel has been, and is now, retained by the firm which is under contract with Mrs. Pollack and members of her family.
>
> * * *
>
> Moreover, there is no evidence that Drexel is not committed to this transaction. Although the majority suggests that Drexel may not be contractually obligated to Bain, the evidence before us leads to the opposite conclusion.
>
> * * *
>
> [H]ypothesizing that a court conceivably might find Drexel uncommitted to Bain is to brush aside both the uncontroverted evidence and the reasonableness standard of Section 455(a). Drexel already has agreed to supply in excess of $200,000,000 . . . .

(A23-24). Nothing could be more erroneous.

On argument before the Second Circuit, Drexel's attorney was asked whether there was any such commitment. His response, as reported in the opinion for the Second Circuit, was that:

> Yet, even at the time of oral argument before us [on October 31, 1988], Drexel stated that though it was *still exploring the matter* and expected to participate, it still had no binding contractual obligation to act for Bain, *i.e.*, to obtain the financing to enable Bain to conclude the transaction.

(A7) (emphasis added). Indeed, it was not until the opinions in the Second Circuit were issued in November that Drexel committed to participate in providing financing to Bain (SHI).

The force of the incontrovertible facts completely negates the minority opinion. Since the established fact was that Drexel gave a commitment to Bain (SHI) only after Drexel began the pursuit of Judge Pollack's recusal, a reasonable person would have considered this as cogent evidence of the absence of any appearance affecting the Judge's impartiality. Certainly, Drexel could not claim that, having knowingly and intentionally attempted to create an appearance of lack of impartiality, it could then rely on it for recusal.

II. THE SECOND CIRCUIT APPLIED THE CORRECT STANDARD FOR MANDAMUS REVIEW.

A. The Second Circuit Applied the Correct Standard for Mandamus Review and This Court Should Not Create an Exception to That Standard.

This Court has established that the "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp.* v. *Daiflon Inc.*, 449 U.S. 33, 34 (1980). *See Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-85 (1953). Mandamus is an extraordinary remedy reserved for extraordinary circumstances. *Ex Parte Fahey*, 332 U.S. 258, 260 (1947). In light of the extraordinary nature of mandamus, a party seeking mandamus has the "burden of

showing that [his] right to issuance of the writ is 'clear and indisputable.' " *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976) (*quoting Bankers Life*, 346 U.S. at 384).

The Second Circuit applied the above-stated standard for mandamus review in declining to issue a writ of mandamus directing recusal of Judge Pollack. (*See* A12). Petitioners do not directly attack the Second Circuit's application of the standard for mandamus review. Rather, Petitioners argue that the universal standard for mandamus review should be different in this case. They claim that a less strict standard for mandamus is necessary to encourage appeals of judicial disqualification issues before final judgment. (Pet. 17). Petitioners also maintain that their proposed mandamus standard will prevent "the unnecessary expenditure of considerable judicial and private resources . . . ." (Pet. 17). This Court has previously considered and rejected similar arguments.

A strict standard for mandamus review is necessary in order to discourage piecemeal appeals. *Kerr*, 426 U.S. at 403. In an era of crowded dockets, it is in the interest of the fair and prompt administration of justice not to countenance policies that undermine efficient judicial review. *See id.* As this Court has stated:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only when appeal is a clearly inadequate remedy. We are unwilling to use them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.

Ex Parte Fahey, 332 U.S. at 259-60 (*quoted in Bankers Life*, 346 U.S. at 384-85).

The party seeking mandamus must show that it has no other means to obtain the relief it desires. *Kerr*, 426 U.S. at 403; *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

Thus, so long as an appeal is available in the regular course, mandamus should not be used to short-cut the process. *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202-03 (1945). Petitioners have made no contrary showing; direct appeal is available here and the mandamus standard was properly applied.

Petitioners claim that a softer mandamus standard for recusal motions is necessary to prevent inconvenience is unconvincing. This Court has already established that mandamus will not issue merely to prevent judicial inconvenience and hardship. *Bankers Life*, 346 U.S. at 383; *United States Alkali Export Ass'n*, 325 U.S. at 202-03.

Petitioners urge two other reasons for their proposed new standard: a lower standard is necessary to prevent recusal from turning into a tactical game and because the well-established standard for mandamus review is insufficient to remove an alleged "cloud" over the litigation. (Pet. 17-18). Both contentions are flawed.

The standard advocated by Petitioners would only encourage meritless disqualification motions as a tactic for delay and harassment. Petitioners' suggested standard would encourage judge-shopping and give litigants an incentive to create a "cloud" that would not otherwise exist. The result would be to undermine public confidence in the judicial system.

Petitioners offer no reasonable explanation as to why direct appellate review is particularly inadequate on recusal motions. Petitioners' argument that any alleged "taint" must be immediately purged could be made in innumerable other contexts, *i.e.*, orders directing or denying production of documents claimed to be protected by attorney-client privilege or orders granting or denying disqualification of counsel. *Cf. Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) (motion to disqualify counsel in civil case not reviewable on interlocutory appeal). Petitioners' rationale for the proposed exception, if fairly applied to other situations, would cause the exception to swallow the rule. In reviewing a similar request to reformulate the mandamus standard, this Court stated:

> If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed [by writ of mandamus]. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal . . . [Congress intended mandamus] to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" . . . .

Bankers Life, 346 U.S. at 382-83.

There is simply no reason to carve out an exception to the mandamus standard for judicial recusal issues. Congress, in discussing the relevant recusal statute, 28 U.S.C. § 455(a), has expressed no contrary intention. *See* H.R. Rep. No. 1453, 93rd Cong., 2d. Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6355 (the "House Report"). This Court should have nothing to do with the mischief which would result from altering the standard for mandamus review.[8]

B. The Standard for Mandamus Review Applied by the Second Circuit Does Not Conflict With the Standard Applied By Other Circuits.

Despite the Second Circuit's correct application of the well-established standards for mandamus review, Petitioners contend that the Second Circuit's decision conflicts with the standards applied by the Fourth, Fifth and Seventh Circuits. Petitioners are wrong.

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[8] Contrary to Petitioners' contention, the Second Circuit's opinion is not "at odds" with this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 108 S. Ct. 2194 (1988). (Pet. 16). Unlike *Liljeberg*, which was a direct appeal from a final decision, the Second Circuit decision involved mandamus review. The Second Circuit simply applied the *Liljeberg* test under the established mandamus standards. *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Co.*, 460 U.S. 1, 18 (1983) (recognizing that the different standards applicable for direct appeal and mandamus may affect a court's ultimate determination). There is nothing here that need be reviewed on a writ of certiorari.

Petitioners argue that *In re Rodgers*, 537 F.2d 1196 (4th Cir. 1976), and *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), apply a mere error standard to the grant of mandamus and are in conflict with the Second Circuit decision. (Pet. 18-19). Neither *Rodgers* nor *Faulkner* discusses the standard applied in granting the writ of mandamus. Both cases merely state that the writ be issued. *Rodgers*, 537 F.2d at 1197 ("We grant the writ because we believe his disqualification is required. . . ."); *Faulkner*, 856 F.2d at 717 (". . . recusal is required, we grant the petition."). Since neither case discusses the standard, it must be assumed that the proper standard was applied, and there can be no conflict.

Similarly, there is no conflict between the Second Circuit's opinion and those of the Seventh Circuit. Petitioners quote selectively from *Union Carbide Corp.* v. *United States Cutting Service, Inc.*, 782 F.2d 710, 712 (7th Cir. 1986), to suggest that the Seventh Circuit has a more liberal mandamus standard than that applied by the Second Circuit. The *Union Carbide* court did not say that it liberally granted writs of mandamus. Rather, the court stated that it has "been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify." *Id.* at 712.[9] The language Petitioners quote does not go to the standard for granting writs of mandamus, but rather to the standard under which the Seventh Circuit will hear petitions for writs of mandamus. In fact, the court was quite careful to emphasize that,

> [o]f course, in frivolous and even routine cases in which a party challenges the judge's refusal to recuse himself, mandamus will be denied—with sanctions, if the petition for mandamus is frivolous.

Id. Thus, the Seventh Circuit does not apply a liberal mandamus standard; rather, it follows the well-settled rule that mandamus is available only in extraordinary cases.

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[9] The Seventh Circuit views denial of a motion to disqualify as not properly reviewable on direct appeal. *United States v. Balistrieri*, 779 F.2d 1191, 1204 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986). Whether the Seventh Circuit is correct is not an issue now before this Court.

Despite Petitioners' attempts to intimate otherwise, there is no conflict among the Circuits and no reason to grant certiorari.

III. THE SECOND CIRCUIT CORRECTLY APPLIED § 455(a) AND IS IN ACCORD WITH *LILJEBERG*.

In attacking the Second Circuit's determination that no basis for recusal exists, Petitioners argue that the court has failed to apply the correct legal standard. Petitioners claim that the reasonable person standard applied by the Second Circuit is too sophisticated, includes irrelevant factors and is in conflict with this Court's precedent and with that of other Circuits. These arguments must fail. Petitioners' real disagreement is with how the Second Circuit applied the correct legal principles to the facts. On the facts as found by the District Court and the Second Circuit, the court properly applied the legal standards that comport with all relevant statutory and decisional law, and there is no conflict between its decision or that of any other federal court or with any decision of this Court.

A. The Second Circuit Applied the Correct Standard Under § 455(a) of a Reasonable Person Who Knows and Understands All the Relevant Facts.

Section 455(a) provides for the disqualification of a judge "in any proceeding in which his impartiality may reasonably be questioned." The Second Circuit stated that the standard for determining the appearance of impartiality is "an objective one which assumes that a reasonable person *knows and understands all the relevant facts.*" (emphasis in original) (citations omitted) (A13).[10] This standard is neither novel nor controversial and has been universally adopted by the federal courts of appeal considering the question. *See, e.g., Pepsico Inc.* v. *McMillen*, 764 F.2d 458, 460 (7th Cir. 1985); *United States* v. *DeLuna*, 763 F.2d 897, 907 (8th Cir.), *cert. denied*, 474 U.S.

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[10] The court so concluded after taking note of Congress' statement that

> The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.

House Report at 6355.

980 (1985); *United States* v. *Dalfonso*, 707 F.2d 757, 760 (3d Cir. 1983).

Petitioners argue that the Second Circuit gave only "lip service" to the proper standard and applied a "subjective" test. (Pet. 9). Further, Petitioners argue that the Second Circuit conducted a factual analysis that could only be accomplished by a "super-sophisticated" individual and looked at the question of impartiality from the "purely legalistic perspective" of a sophisticated person. (Pet. 9, 10).

Petitioners' contention that the Second Circuit applied an incorrect standard is contrary to fact. The Second Circuit makes clear that the standard it applied is whether "a reasonable person knowing and understanding all the relevant facts would recuse the judge." (A14. *See also* A13, A18, A20). Despite Petitioners' assertion otherwise, the court's conclusion did not call for a "sophisticated observer well-versed in financial and legal niceties." (Pet. i). Rather, the Second Circuit simply reviewed the facts and concluded that the reasonable person would think Drexel's role in providing financing to Bain (SHI) (then not committed) and Mrs. Pollack's sale of stock to Bain (SHI) were too remotely situated to cause doubt about Judge Pollack's impartiality.

The Second Circuit was concerned that the dissenter's position would lead to an unjustifiable denigration of the reasonable person standard. The Second Circuit did not think that a reasonable person should be deemed incapable of understanding the existence, nature or lack of a relationship among or between parties, or that a reasonable person would draw a conclusion about a judge's fair-mindedness without knowledge of all the facts. Petitioners' attempt to convince this Court that the reasonable person is properly viewed as an individual devoid of reasoning capabilities is wasted; an evaluation of the reasonable person's perspective is at its essence a factual determination. The view which Petitioners urge is inconsistent with legislative history, with judicial interpretations of § 455(a) and with common sense.

B. The Second Circuit's Discussion of Judge-Shopping Assertions Was Proper.

Petitioners argue that the Second Circuit in its decision relied on matters "extraneous" to proper considerations under § 455(a). Specifically, they contend that the court improperly based its decision on allegations of judge-shopping by Drexel. (Pet. 11). Petitioners maintain that the Second Circuit erroneously balanced forum shopping concerns against appearances of impropriety and "invent[ed]" a " 'good guy, bad guy' balancing act." (Pet. 11, 12). This reading finds no support in the Second Circuit's decision.

First, although the court expressed its concern that indicia of judge-shopping were present, it stated that the "assertions are not established facts upon which decision may rest" and, thus, "our decision does not turn on these assertions." (A18, A20). *Second*, the Second Circuit said that, if those circumstances indicating judge-shopping were to be considered, they would be viewed not as competing with a policy weighing against a finding of an appearance of impropriety, but rather would be one of the facts taken into consideration by the reasonable person in assessing the existence of that impropriety. (A18, A20). Thus, the question that Petitioners ask this Court to decide simply is not presented by the Second Circuit's opinion.

C. The Second Circuit's Decision Is Not in Conflict with This Court's Decision in *Liljeberg* or With Any Decision of Other Circuits.

Petitioners claim that the Second Circuit's decision is "at odds" with this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, ___ U.S. ___, 108 S. Ct. 2194 (1988). (Pet. 12). In *Liljeberg*, this Court held that a judicial officer's scienter was not an element of § 455(a) and affirmed the opinion of the Fifth Circuit Court of Appeals mandating disqualification. 108 S. Ct. at 2202. In doing so, this Court noted that the applicable standard was that of an "objective observer", 108 S. Ct. at 2203, and cited without disagreement the lower court's formulation of "a reasonable person, knowing all the circumstances." 108 S. Ct. at 2202 (*citing* 796 F.2d at 802).

Petitioners contend that the facts of the instant case spell out a clearer case for disqualification than those in *Liljeberg*. (Pet. 12). Not only do Petitioners again ask for a factual review and present no legal issue, but they provide an underlying factual assessment that is inaccurate. Petitioners suggest that while Judge Pollack somehow stood to gain a financial benefit, the trial judge in *Liljeberg* merely had the fulfillment of fiduciary duties at stake. (Pet. 12-13). This is a misstatement of the facts in the instant case. As noted above, the Second Circuit and the District Court found that Drexel's activity could not be reasonably viewed as inuring to the benefit or detriment of Judge Pollack or his wife. (A17-18). Unlike in *Liljeberg*, where the trial judge's rulings in the case before him directly benefited Loyola University, the party with which he was associated (*see* 108 S. Ct. at 2197-98), in this case Judge Pollack will make no ruling that can benefit or harm him, his wife or any entity in which they have an interest, financially or otherwise.

Petitioners' attempt to state a "direct conflict" between the Second Circuit and the decision of the Fifth Circuit in *Faulkner* falls flat. In *Faulkner*, the court said that the view of the "average, reasonable person" is the standard for analysis. 856 F.2d at 720. Notwithstanding Petitioners' suggestion otherwise, the court's use of the modifier does not conflict with the standard accepted by the Second Circuit and other federal courts of appeal. *Faulkner*, quoting *Liljeberg*, recognized that the standard is that of "a reasonable person, knowing all the circumstances." 856 F.2d at 721 (*quoting* 108 S. Ct. at 2202).

Petitioners' reliance on *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), to create a conflict is disingenuous. The test applied in *Parker* was "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought" would find the judge impartial. *Id.* at 1524. The formulation of this test does not substantively differ from that followed by the Second Circuit.

Neither *Faulkner* nor *Parker* conflicts with the decision by the Second Circuit in the instant case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 5, 1989

APPENDIX

EXCERPTS FROM CONSENT AND UNDERTAKINGS OF DREXEL BURNHAM LAMBERT INCORPORATED AND THE DREXEL LAMBERT GROUP INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Securities and Exchange Commission,

Plaintiff,

v.

Drexel Burnham Lambert Incorporated;
Drexel Burnham Lambert Group Incorporated;
Michael R. Milken;
Lowell J. Milken;
Cary J. Maultasch;
Pamela R. Monzert;
Victor Posner;
Steven N. Posner;
and
Pennsylvania Engineering Corporation,

Defendants.

88 Civ. 6209 (MP)
Consent and Undertakings of Drexel Burnham Lambert Incorporated and The Drexel Lambert Group Inc.

1. Defendants DREXEL BURNHAM LAMBERT INCORPORATED and THE DREXEL BURNHAM LAMBERT GROUP INC. (hereinafter referred to as "DREXEL" and "GROUP," respectively) acknowledge service upon them of the COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF ("COMPLAINT") of Plaintiff SECURITIES AND EXCHANGE COMMISSION

("COMMISSION") in this action, enter a general appearance, admit the service of the COMPLAINT upon them and consent to the jurisdiction of this Court over them and over the subject matter of this action.

2. DREXEL and GROUP, without admitting or denying any of the allegations of the COMPLAINT, except as to jurisdiction which each of them admits, and consistent with the provisions of 17 C.F.R. Section 202.5(e), hereby consent to the entry of a FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF AS TO DREXEL BURNHAM LAMBERT INCORPORATED AND THE DREXEL BURNHAM LAMBERT GROUP INC. in the form annexed hereto ("FINAL JUDGMENT"), restraining and enjoining DREXEL and GROUP from engaging in transactions, acts, practices and courses of business which constitute or would constitute violations of Sections 7(c), 7(f), 9(a)(2), 10(b), 13(d), 14(a), 14(e), 15(c)(3) and 17(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78g(c), 78g(f), 78i(a)(2), 78j(b), 78m(d), 78n(a), 78n(e), 78o(c)(3) and 78q(a)(1)], Regulations T and X and Rules 10b-5, 10b-6, 13d-1, 13d-2, 14a-9, 14e-3, 15c3-1, 17a-3 and 17a-4 promulgated hereunder [12 C.F.R. §§ 240.10b-5, 10b-6, 13d-1, 13d-2, 14a-9, 14e-3, 15c3-1, 17a-3 and 17a-4] and Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 78q(a)], and which aid and abet or would aid and abet violations of Sections 7(c), 9(a)(2), 10(b), 13(d), 14(e), 15(c)(3) and 17(a)(1) of the Exchange Act [15 U.S.C. §§ 78g(c), 78i(a)(2), 78j(b), 78m(d), 78n(e), 78o(c)(3) and 78q(a)(1)] and Regulation T and Rules 10b-5, 13d-1, 13d-2, 14e-3, 15c3-1, 17a-3 and 17a-4 promulgated thereunder [12 C.F.R. § 220.1 et seq., and 17 C.F.R. §§ 240.10b-5, 13d-1, 13d-2, 14e-3, 15c3-1, 17a-3 and 17a-4].

3. DREXEL and GROUP waive the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

4. DREXEL and GROUP agree that paragraphs 1 through 15 and 28 through 36 of this CONSENT AND UNDERTAKINGS ("CONSENT") shall be incorporated into the FINAL JUDGMENT by reference.

* * *

34. DREXEL and GROUP each agrees not to petition the Supreme Court of the United States for a writ of certiorari, or to seek or to join further in the motions of others requesting the recusal of the Honorable Milton Pollack in this and all related actions. DREXEL and GROUP each further agrees not to seek any stay of proceedings in this action, and to join the COMMISSION in any application to lift any such stay, as such stay may affect the consideration, entry, implementation, administration and enforcement of the FINAL JUDGMENT by the Court, it being understood that if the action commenced by the COMPLAINT is reassigned to a judge other than the Honorable Milton Pollack, then DREXEL and GROUP and the COMMISSION shall jointly move that the implementation, administration and enforcement of the FINAL JUDGMENT be reassigned to the same judge.

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